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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 758

In the Matter of

RAMON NOVARRO.

PETITION FOR WRIT OF CERTIORARI.

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RAMON NOVARRO.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice Earl Warren and to the Justices of the Supreme Court of the United States:

Your petitioner, Ramon Novarro, respectfully petitions this honorable court for a Writ of Certiorari directed to the Supreme Court of the State of California to review and reverse its decision denying your petitioner a Writ of Habeas Corpus on October 10, 1962.

Opinion Below.

At 58 Advanced California Reports 17 on page 2 of the Minutes of the Supreme Court of the State of California is the following decision of the Supreme Court of the State of California:

"Crim 7216—In re Novarro on Habeas Corpus.

Petition for Writ of Habeas Corpus denied."

This is the entire opinion of the Supreme Court of the State of California.

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 1527, United States Code, which provides as follows:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court of the United States . . . (3) by Writ of Certiorari . . . where any right, privilege or immunity is specially set up or claimed under the Constitution . . . of the United States."

Constitutional Provisions.

The 14th Amendment to the Constitution of the United States guarantees to your petitioner equal protection of the laws, and his right not to be deprived of his liberty without due process of law.

Statutes of the State of California Involved.

The following Paragraphs of the Vehicle Code of the State of California, read as follows:

Section 40300: Application of Chapter.

> "The provisions of this chapter shall govern all peace officers in making arrests for violations of this code without a warrant for offenses committed in their presence, but the procedure prescribed herein shall not otherwise be exclusive of any other method prescribed by law for the arrest and prosecution of a person for an offense of like grade."

Section 40301: Procedure.

> "Except as provided in this chapter, whenever a person is arrested for any violation of this code declared to be a felony, he shall be dealt with in like manner as upon arrest for the commission of any other felony."

Section 40302: Mandatory Appearance.

"Whenever any person is arrested for any violation of this code, not declared to be a felony, the arrested person shall be taken without unnecessary delay before a magistrate within the county in which the offense charged is alleged to have been committed and who has jurisdiction of the offense and is nearest or most accessible with reference to the place where the arrest is made in any of the following cases:

"(a) When the person arrested fails to exhibit his driver's license or other satisfactory evidence of his identity.

(b) When the person arrested refuses to give his written promise to appear in court.

(c) When the person arrested demands an immediate appearance before a magistrate.

(d) When the person arrested is charged with violating Section 20001, 23102, 23105 or 23106."

Section 40306: Misdemeanor Procedure before Magistrate.

"(a) Whenever a person is arrested for a misdemeanor and is taken before a Magistrate, *the arresting officer shall file with the Magistrate a complaint stating the offense with which the person is charged.* (italics supplied.)

(b) The person taken before a Magistrate shall be entitled to at least five days continuance of his case in which to plead and prepare for trial and the person shall not be required to plead or be tried within the five days unless he waives such time in writing or in open court.

(c) The person taken before a Magistrate shall thereupon be released from custody upon his own recognizance or upon such bail as the Magistrate may fix."

Section 40307: Magistrate Unavailable.

"(a) When an arresting officer attempts to take a person arrested for a misdemeanor violation of this code before a magistrate and the magistrate or person authorized to act for him is not available, the arresting officer shall take the person arrested before the clerk of the magistrate or the officer in charge of the most accessible county jail, city jail, or other place of detention within the county, who shall admit him to bail in accordance with a schedule, fixed as provided in Section 1269 (b) of the Penal Code."

Section 15 "SHALL" and "MAY"

" 'Shall' is mandatory and 'may' is permissive."

Section 23102: Misdemeanor Drunk Driving.

"(a) It is unlawful for any person who is under the influence of intoxicating liquor, or under the combined influence of intoxicating liquor and any drug, to drive a vehicle upon any highway. Any person convicted under this section shall be punished upon a first conviction by imprisonment in the County Jail for not less than thirty days nor more than six months, or by fine of not less than Two Hundred Fifty Dollars ($250.00) nor more than Five Hundred Dollars ($500.00) or by both such fine and imprisonment, and upon a second or any subsequent conviction by imprisonment in the County Jail for not less than five days nor

more than one year and by a fine of not less than Two Hundred Fifty Dollars ($250.00) nor more than One Thousand Dollars ($1,000.00). A conviction under this section shall be deemed a second conviction if the person has previously been convicted of a violation of Section 23101 of this Code.

(b) Any person convicted of a second or subsequent offense under this section shall not be granted probation by the court, nor shall the court suspend the execution of the sentence imposed upon such person."

Section 23101: Felony Drunk Driving.

"Any person who, while under the influence of intoxicating liquor drives a vehicle and when so driving does any act forbidden by law or neglects any duty imposed by law in the driving of such vehicle, which act or neglect proximately causes bodily injury to any person other than himself is guilty of a felony and upon conviction thereof shall be punished by imprisonment in the State Prison for not less than one year nor more than five years, or in the County Jail for not less than ninety days nor more than one year and by fine of not less than Two Hundred Fifty Dollars ($250.00) nor more than Five Thousand Dollars ($5,000.00)."

The Penal Code of the State of California, Part 2, Title 2, Section 740 reads as follows:

"Section 740. (Public Offenses Triable in Inferior Courts: Prosecution by Written Complaint Under Oath: Verification on Information and Belief.) *Except as otherwise provided by law,* (italice supplied) all 'public offenses triable in the in-

ferior courts must be prosecuted by written complaint under oath and subscribed by the complainant. Such complaint may be verified on information and belief."

Questions Presented by This Petition.

1. Whether due process under the Fourteenth Amendment to the Constitution of the United States requires that the defendant in a criminal action shall have an opportunity to prove either at or before his trial that the appropriate criminal procedure established by the State Legislature has not been followed and that by reason thereof, the trial court lacks jurisdiction over him.

(a) Whether non-compliance with a mandatory requirement of a Statute of a State by the officers of that State, or a subdivision thereof, is non-compliance with due process under the Fourteenth Amendment of the Constitution of the United States.

2. Whether the equal protection of the laws promised to all citizens of the United States under the Fourteenth Amendment to the Constitution of the United States requires that all defendants in criminal proceedings be treated equally under the law without regard to whether a magistrate is immediately available at the time of arrest, or whether or not the defendant has been released on bail, or is kept in jail until a magistrate is available.

(a) Whether or not the trial court has jurisdiction to try a defendant arrested for an alleged violation of Section 23102 of the Vehicle Code of the State of California when the complaint upon which the trial is proceeding has not been filed in compliance with the

law but has been filed on information and belief by a person other than the arresting officer as required by the statutory law of the State of California.

Statement of Facts.

On February 20, 1962, petitioner, Novarro, was arrested by police officers, R. E. Hattey and E. J. Jewell, taken to the police station in the County of Los Angeles, State of California, and charged with violation of Vehicle Code 23102. A verified complaint filed upon information and belief was later filed by one J. W. Fletcher, who was not one of the arresting officers nor a witness to the arrest. A motion to dismiss the complaint on the ground of lack of jurisdiction, because the complaint was filed on information and belief *not* by one of the arresting officers, was made before trial on March 21, 1962 and was denied on March 26, 1962 in Division 70 of the Municipal Court of Los Angeles Judicial District, in a Minute Order holding that the said court had jurisdiction of the cause and ordering the trial of the defendant, petitioner, to proceed. On March 26, 1962, the said court found the said petitioner guilty of a violation of said Vehicle Code, Section 23102(a) and continued the matter for sentencing, and did sentence the petitioner on June 26, 1962 to 15 days in the County Jail of the County of Los Angeles, State of California, plus a fine of $250.00. At the trial, the petitioner stood on his motion to dismiss for lack of jurisdiction, and the case was submitted to the Municipal Court on the arrest report.

Petitioner filed a petition for a Writ of Prohibition in the Superior Court of the State of California for the County of Los Angeles, 794977, and an amended

petition for Writ of Prohibition with the said Superior Court, which was denied, without hearing, on June 15, 1962.

Petitioner filed a petition for Writ of Prohibition with the District Court of Appeal of the State of California, 2nd Civil 26535, which petition was denied by the said court on June 25, 1962, without opinion.

Petitioner petitioned for a hearing before the Supreme Court of the State of California from a denial of the Writ of Prohibition by the District Court of Appeal. Said petition for hearing was denied by the Supreme Court of the State of California on July 25, 1962, without opinion.

An Appeal from the decision of the Municipal Court of the Los Angeles Judicial District was not filed on behalf of the Defendant Novarro until notice by the California Supreme Court of its denial on July 26, 1962; said Appeal was dismissed by the Appellate Department of the Superior Court of the State of California for Los Angeles County on its own motion on August 9, 1962, on the ground that it lacked jurisdiction since no appeal was filed within ten (10) days after sentence had been pronounced on June 26, 1962 as required by statute (While the matter was before the Supreme Court of the State of California on the Writ of Prohibition).

Petitioner then filed for a Writ of Habeas Corpus with the Superior Court of the State of California, for the County of Los Angeles which was denied by said court on August 23, 1962.

Petitioner then petitioned for a Writ of Habeas Corpus to the District Court of Appeal 2nd District.

of the State of California, which petition was denied on September 13, 1962.

Petitioner then petitioned to the Supreme Court of the State of California for Writ of Habeas Corpus which was denied by said Supreme Court on October 10, 1962.

On October 4, 1962, petitioner filed a petition for writ of Habeas Corpus with the United States District Court, Southern District of California, Central Division, and his petition was denied on the ground that his state remedies had not been exhausted; *i.e.*, that a petition for a Writ of Certiorari to review the decision of the Supreme Court of the State of California denying the Writ of Habeas Corpus had not been filed with or acted upon by the Supreme Court of the United States.

A stay of execution of the sentence of the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, was granted by the said Municipal Court until October 4, 1962. A further stay of execution of the sentence was granted by the United States District Court, Southern District of California, Central Division, until such time as petitioner could petition the Supreme Court of the State of California for a stay of execution pending the filing of a petition with the Supreme Court of the United States for Writ of Certiorari, and for further stay, but not later than November 26, 1962. The petition for stay of execution was denied by the Supreme Court of the State of California, on or about November 10, 1962, and the petition for a stay of execution filed before this honorable court was denied by the Honorable Mr. Justice Douglas on November 21, 1962. Thereafter, and on November 21, 1962, the United States District

Court, Southern District of California, Central Division, ordered stay of execution of a sentence "pending the filing of petitioner's application for a Writ of Certiorari with the Supreme Court of the United States, and not later than January 9, 1963," and further ordered that such stay should continue "pending said filing and disposition of said Writ of Certiorari."

On the 31st day of August, 1962, the Appellate Department of the Superior Court in and for the County of Los Angeles, State of California in the case of *People v. Maggiora* issued the first written decision on any case involving the points of law involved in this case. A copy of said decision is attached hereto and made a part hereof by reference and is marked Exhibit 1 in appendix. The jurisdictional facts in the *Maggiora* case were the same as those in your Petitioner's case. The purpose in attaching the copy of said court decision in the *Maggiora* case was to indicate to your Honorable Court the thinking of the Courts in the State of California with reference to the subject matter of this instant proceeding. The decision itself indicates that the court is insuring unequal protection of the laws of the State of California in the following manner: If a person is arrested for drunk driving (violation of Section 23102, Vehicle Code), and is not brought before a magistrate, but is released on bail by his jailer, then he is not entitled to protection of Section 40306 of the Vehicle Code which requires that the arresting officer file the complaint.

Reasons for Granting the Writ.

(1) The United States Supreme Court is the final arbiter as to what constitutes due process of law. *State v. Schifsky*, 69 N. W. 2d 89, 243 Minn. 533; *State v. Northwest Airlines*, 322 U. S. 292.

The petitioner is entitled, under a due process of law clause of the 14th Amendment to the United States Constitution to be tried by the established rules of procedure determined by the legislature. *People v. Horiuchi*, 114 Cal. App. 415; *People v. Gilbert*, 25 Cal. 2d 422. As stated in *Garner v. Louisiana*, 7 L. Ed. 2d 207, at p. 214:

> "It is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support his conviction.
>
> "Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty."
>
> *Ex parte Quirin*, 63 S. Ct. 22, 87 L. Ed. 3.
>
> * * * * *
>
> "The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the traditional and conscience of our people as to be ranked as fundamental.'" But "the state may not permit an accused to be hurried to conviction. . . . Moore v. Dempsey, 261 U. S. 86, 91, 67 L. Ed. 543."
>
> *Voight v. Webb*, 47 F. Supp. 743, 746.

Under our vaunted legal system, no man, however bad his behavior may be convicted of a crime of which he was not charged, proven and found guilty in accordance with due process. *Parr v. United States,* 363 U. S. 370. If the complaint filed in this case against petitioner was not filed by the arresting officer, as is a mandatory requirement under the statute, then no complaint was actually filed against the petitioner and the petitioner was found guilty and convicted for a charge that was never properly made in the court. This is denial of due process under the 14th Amendment to the Constitution. It is settled that if the defendant has not been legally committed and if the trial court erroneously denies the motion to set aside and permits the action to proceed to judgment, the resulting conviction must be reversed. *People v. Elliot,* 54 Cal. 2d 498, 503. When there are procedural errors in the trial of one accused of a crime, it is true that timely objection must be made to the errors or the errors may be waived. *People v. Howard,* 111 Cal. 655. In petitioner's case, however, the objection as to the procedural defect has been relied upon from the beginning of the accusation against him.

The words of a statute are to be interpreted according to their common and ordinary acceptation. *People v. Amden,* 123 Cal. App. 2d Supp. 951, 970.

Paragraph 40306(a) of the California Vehicle Code is certainly plain and unambiguous when it states that "the arresting officer shall file with the Magistrate a complaint stating the offense with which the person is charged." It is true that paragraph 740 of the Penal Code of the State of California states that the complaint may be verified on information and belief, but it also

states that it may be verified on information and belief only "except as otherwise provided by law . . ." Certainly it is otherwise provided by law in paragraph 40306 of the State Vehicle Code. Furthermore, it would seem to be pertinent that said paragraph 40306 is found in the Vehicle Code, which deals with misdemeanors and felonies in connection with vehicular activities; whereas paragraph 740 of the Penal Code of the State of California is concerned generally with public offenses. Specific statutes take precedence over general statutes.

"Since plain meaning of statute must be followed, courts are prohibited from speculating that legislature meant something other than what it said."

Los Angeles County v. Read (1961), 193 Cal. App. 748, 14 Cal. Rptr. 628.

"A general statutory provision is controlled by one that is special, the special being treated as an exception to the general; specific provision relating to a particular subject will govern in respect to that subject as against general provisions, though general provision, standing alone, will be broad enough to include subject to which particular provision relates."

Los Angeles v. Pacific Elec. R. Co. (1959), 168 Cal. App. 2d 224, 335 P. 2d 1042;

Richarson v. San Diego (1961), 193 Cal. App. 2d 648, 14 Cal. Rptr. 494;

People v. Perez (1961), 198 A. C. A. 489, 18 Cal. Rptr. 164.

LIBERAL OR STRICT CONSTRUCTION:

"Defendant in criminal case is entitled to benefit of every reasonable doubt as to true interpretation of words or construction of language in a statute.

People v. Holtzendorff (1960), 177 Cal. App. 2d 788, 2 Cal. Rptr. 676.

ERRONEOUS CONSTRUCTION:

"An erroneous administrative construction does not govern interpretation of statute."

Wallace v. State Personnel Board (1959), 168 Cal. App. 2d 543, 336 P. 2d 223.

SPECIAL AND GENERAL STATUTE:

"Special statute dealing expressly with particular subject controls and takes precedence over general statute covering same subject."

Simpson v. Cranston (1961), 56 Cal. 2d 63, 362 P. 2d 492.

NECESSITY FOR CONSTRUCTION—UNAMBIGUOUS STATUTE:

"If statute is clear, courts should enforce legislative intent as disclosed thereby.:

Efron v. Kalmanovitz (1960), 185 Cal. App. 2d 149, 8 Cal. Rptr. 107.

(2) It is elementary that public officials must themselves obey the law. *Wirin v. Parker*, 48 Cal. 2d 890, 894.

When a statute is passed by the legislature of a state setting out in particularity what shall happen when a vehicular misdemeanor occurs, and making it mandatory that what shall happen must happen with respect to a complaint stating an offense against the person being

charged for the vehicular misdemeanor, and the state and its officers intentionally flaunt the plain wording of the statute, then the person so arrested is being denied the equal protection of the laws and due process under the 14th Amendment. The purpose of the equal protection clause of the 14th Amendment is to secure to every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. *Sunday Lake Iron Company v. Township of Wakefield*, 247 U. S. 352. An actual discrimination arising from the method of administering the law is a potential in creating a denial of equality of rights guaranteed by the law. *Rogers v. State of Alabama*, 192 U. S. 226. A state is not required by the Federal Constitution to provide different sets of procedural criminal statutes for different types of crimes, but where different sets of criminal procedural statutes are provided by a state, it cannot deny the rights to a person allegedly guilty under one statute providing one procedure by complaining against him under a different statute providing a different procedure. *Griffin v. Illinois*, 351 U. S. 12, 100 L. Ed. 891.

A conviction under Section 23101 of the Vehicle Code of the State of California is deemed a conviction *malum in se*. A conviction under a comparable statute in the State of Michigan was so deemed. *People v. Townsend*, 214 Mich. 267. In the State of California, the courts have recognized that the requisite feloneous intent for conviction under Section 23101 of the Vehicle Code is the equivalent of that necessary for a conviction under Section 23102 of the Vehicle Code.

See *People v. Gossman*, 95 Cal. App. 2d 293, holding that a charge under former Section 501 of the Vehicle Code will support a conviction under former Section 502 of the Vehicle Code, those former sections being present Sections 23101 and 23102 of the Vehicle Code respectively. The ordinary misdemeanor prosecution procedure is as set out in Section 740 of the Penal Code of the State of California. But the misdemeanor with which petitioner is charged under Section 23102 of the Vehicle Code is not an ordinary misdemeanor. It is a misdemeanor for which under Section 40302 of the Vehicle Code of the State of California, subparagraph (d) the person arrested shall (must) be taken without unnecessary delay before a Magistrate. Under Section 40306 of the Vehicle Code, when the person is arrested and taken before the Magistrate he is entitled to have the *arresting officer* file with the Magistrate a complaint stating the offense for which he is charged. Such rights are not required by the law for arrests of ordinary misdemeanors under Section 740 of the Penal Code of the State of California. Nowhere else in the Vehicle Code is there a statute permitting the filing of the complaint by anyone other than the arresting officer.

The equal protection clause of the 14th Amendment to the Constitution of the United States applies to a criminal case. *Griffin v. Illinois*, 351 U. S. 12, at pages 16 to 18. J. W. Fletcher was not the arresting officer who arrested the petitioner, either with or without a warrant. He was not a witness to the alleged misdemeanor. He had no personal knowledge of the facts set out in the complaint. He had no information or belief upon which to base his filing of the complaint

against the petitioner. His only knowledge with respect to petitioner's alleged violation was what he gleaned from the arresting police report which to him might or might not have been true. The fact that the complaint may have appeared to have been valid upon its face does not grant the court jurisdiction over the petitioner. *United States v. Langsdale*, 115 F. Supp. 489. *United States Ex Rel. King v. Gokey*, 32 F. 2d 793. *United States v. Baumart*, 179 Fed. 735; *United States v. Wells*, 225 Fed. 320; *United States v. Rurocde*, 220 Fed. 210. In *Wells v. Justice*, 181 Cal. App. 2d 221, at page 225, the California Appellate Court said:

> "The preliminary complaint in a criminal proceeding is merely an allegation in writing, signed by a person *who knows the facts*. . . ."

When a complaint is stated upon information and belief, there is no presumption that the complaint is made on the personal knowledge of the officer complainant. *Giordenello v. United States*, 357 U. S. 460, 486.

> "Thus, the trial court by accepting with approval the fruits of this long chain of Constitutional and Statutory infringements became the consumate force in the denial of due process. When the Trial Court permitted itself under the pressure of a sense of devotion to law enforcement by the State, to become the pinnacle of this pyramid of indignities offensive to the 'sense of justice', it lost jurisdiction and was without authority of law to pronounce a valid judgment and sentence."

Leyia v. Denno, 347 U. S. 556.

Stages of the Proceedings in the State Courts at Which, and the Manner in Which, the Federal Questions Sought to Be Reviewed Were Raised.

The Federal questions of due process and equal protection under the 14th Amendment to the Constitution of the United States were raised by argument of counsel for petitioner on motion to dismiss on March 21, 1962 and March 26, 1962 in the Municipal Court of the Los Angeles Judicial District; and counsel for petitioner's argument and brief before the District Court of Appeal, 2nd Appellate District, State of California upon his petition for Writ of Prohibition before said court, in paragraph XI thereof, which is quoted as follows:

> "That said respondent should be restrained from proceeding with said sentencing for the reason that the complaint herein is void and ineffectual to confer jurisdiction upon respondent court to try your petitioner for the offense charged therein on the following grounds:
>
> "The constitutional guarantee of due process afforded the petitioner by the United States Constitution and the 14th Amendment has been violated by said respondent, Municipal Court, in the following respects:
>
> "1. Section 40302 of the Vehicle Code provides that a person charged with violation of Section 23102(a) shall be taken before a magistrate within the county in which the offense charged is alleged to have been committed and who has jurisdiction of the offense and is nearest and most accessable with respect to the place where the arrest is made.

"2. Section 40306 of the Vehicle Code provides that in the event a person is arrested for a misdemeanor and is taken before a magistrate, the *arresting officer shall file* with the magistrate a complaint stating the offense with which the person is charged (emphasis added).

"3. Section 15 of the Vehicle Code provides that the word 'shall' is mandatory and the word 'may' is permissive.

"4. Where a statute restricts the making of a complaint to certain persons, it may be made by such persons only.

"The unconditional guarantee of equal protection of the laws afforded the petitioner by the United States Constitution and the 14th Amendment has been violated by said respondent court.";

and petitioner raised the federal question in his petitions for Writs of Prohibition and Writs of Habeas Corpus before all of the other courts of the State of California in which said petitions have been filed by counsel for petitioner; but so as not to be unduly repetitive, petitioner has filed herein in the appendix his petition for writ and points and authorities which he filed in the Supreme Court of the State of California for a Writ of Habeas Corpus on September 17, 1962, and has marked said Petitioner's Exhibit 2 in Appendix.

We pray for a certiorari to the Supreme Court of the State of California.

Respectfully submitted.

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Attorneys for Petitioner.